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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE MERREL CLINE

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JURISDICTION

The Court has postponed the question of jurisdiction to the hearing on the merits. Appellee Cline has filed a motion to dismiss the appeal. This motion is still pending.

Appellants pose three questions on appeal. The first two of these questions concern the constitutionality of R.C.M., 1947, §95-1711. It is Appellee's position that the questions on which this decision depends are so unsubstantial as not to need further argument. This contention is based on the fact that the federal courts, including the Supreme Court, have, without exception, applied the rule that jeopardy attach upon the swearing of the jury

to the state courts. This issue is discussed fully in the following brief.

Appellant's third issue raises the question of "manifest necessity". The issue of "manifest necessity" does not come within the jurisdiction of this Court under 28 U.S.C. 1254 (2), since the issue does not involve the constitutionality of a state statute. Further, Appellants have specifically admitted that the Court lacks jurisdiction over the issue of "manifest necessity". See Appellant's brief, p. 14.

QUESTIONS PRESENTED

On page 3 of their Brief, the appellants pose the question, "Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?"

Appellee Cline takes exception to the question as posed by the appellants. Contrary to the tenor of the question as stated, the attachment of jeopardy rule is not part of the Federal Rules of Criminal Procedure. Rather, it is a product of United States Supreme Court case law, as will be discussed in this brief. Correctly stated, the question should read, "Whether the attachment of jeopardy rule is a product of Constitutional exegesis or rather an exercise of the Supreme Court's supervisory power over Federal Courts and officials?"

Secondly, on page 12, the Appellants' Brief asserts that the states are free to adopt "rules that cause jeopardy to attach even earlier [than the Federal rule]. . . ."

This assertion misstates the issue before the Court. The Court is concerned with a Montana statute which provides that jeopardy attach upon the swearing of the first witness; this is a point in time *after* the swearing of the jury which is the rule in the Federal Courts as required by the Supreme Court.

STATEMENT OF THE CASE

This is an appeal by the State of Montana from the Ninth Circuit Court of Appeals' reversal of a denial of Appellees' petition for a Writ of Habeas Corpus. The facts and proceedings which lead to this appeal are as follows:

1. On October 31, 1974, Appellees Cline and Bretz were charged in a nine-count Information in Clause No. 3921 in the State District Court of Lewis and Clark County, Montana. Appellee Cline's wife, Shirley, was also charged in Count Nine of the same Information.

2. On March 10, 1975, the parties commenced a *voir dire* examination of the jury panel.

3. On March 11, 1975, Count Nine was dismissed on motion of the State, thus removing Shirley Cline as a defendant in the prosecution.

4. On March 13, 1975, a jury was impaneled and sworn and then excused; no witnesses were sworn. Defense counsel then moved for an order restricting the State's evidence to the allegations in the Information, *i.e.*, various counts of the Information alleged acts occurring in 1974, and yet charged the defendants with violating statutes which were repealed as of December 31, 1973.

5. On March 24, 1975, the trial judge, on his own motion, dismissed Counts II, VII, and VIII (Appendix pages 3-9) of the Information for "the reason that said Counts are fatally defective on their face; they allege crimes committed after January 1, 1974, under statutes that expired on that day; they therefore fail to charge an offense."

6. On March 24, 1975, counsel for the State of Montana requested a continuance so that the State could petition the Supreme Court of Montana for a Writ of Supervisory Control in regards to the dismissal of the three Counts.

7. On March 28, 1975, counsel for Appellee and for the State presented oral argument to the Montana Supreme Court requesting an adversary hearing on the issuance of a Writ of

Supervisory Control. The Montana Supreme Court scheduled an adversary hearing for April 2, 1975.

8. On April 2, 1975, the Montana Supreme Court refused to further entertain the matter when defense counsel insisted upon having a public hearing in lieu of an *in camera* hearing. The Montana Supreme Court ordered the parties to return to the District Court and to proceed to trial.

9. On April 4, 1975, the State of Montana moved to dismiss the remaining five counts on the Information for the exclusive purpose of filing a new and different Information against the Appellees. Defense counsel objected, refusing to join the State's motion and reserving all rights in the event of a dismissal. The trial court granted the dismissal.

10. On April 4, 1975, a new Information (No. 3963) (Appendix 12-15) was filed charging Appellees Cline and Bretz, along with Appellee's wife, Shirley Cline, each with the commission of two felonies; Grand Larceny and Obtaining Money by False Pretenses. Both of these counts had been charged in the original Information.

11. On April 25, 1975, Appellee filed a motion to dismiss the prosecution on the grounds that he was twice in jeopardy in violation of the Fifth Amendment to the United States Constitution.

12. On May 1, 1975, the Trial Judge denied the Appellee's double jeopardy motion.

13. On May 21, 1975, Appellee requested the Federal District Court to convene a three-judge court to enjoin the state prosecution and to declare R.C.M., 1947, §95-1711(3)(d) unconstitutional. Appellee argued: that unless a double jeopardy determination is made prior to a second trial, the Fifth Amendment loses its substance; a second trial constitutes an irretrievable denial of the Fifth Amendment guarantee against being twice put in jeopardy.

14. On June 6, 1975, the United States District Court denied the application for the convening of a three-judge court. *Cline v. Montana*, 394 F. Supp. 803 (1975).

15. On June 9, 1975, Appellee appealed the District Court denial of a three-judge court to the Circuit Court of Appeals for the Ninth Circuit.

16. On June 10, 1975, the United States District Judge refused to order a stay pending the appeal to the Circuit Court.

17. On June 12, 1975, counsel for Appellees Cline and Bretz submitted a petition to the Ninth Circuit for a stay of the prosecution pending the appeal of the application for a three-judge court.

18. On June 13, 1975, a two-judge panel of the Ninth Circuit Court of Appeals denied Appellees' motion for a stay pending appeal.

19. On June 13, 1975, counsel for Appellees Cline and Bretz applied to the United States Supreme Court for a stay pending appeal to the Ninth Circuit Court of Appeals.

20. On June 14, 1975, the United States Supreme Court (Justice Brennan) denied the application for a stay pending appeal.

21. On June 16, 1975, trial commenced and on July 2, 1975, Appellees Cline and Bretz, along with Appellee Cline's wife, Shirley, were found guilty of Obtaining Money by False Pretenses.

22. On July 17, 1975, Appellees petitioned the Supreme Court of Montana for a Writ of Habeas Corpus on the grounds they were convicted in violation of the Fifth Amendment Guarantee against being put twice in jeopardy.

23. On July 23, 1975, the Montana Supreme Court denied the application for a Writ of Habeas Corpus relying on its decision in *State v. Cunningham*, 535 P.2d 186 (1975). (App. 21-28). In *Cunningham*, the Montana Supreme Court held that the United States Supreme Court rulings that jeopardy attaches when a jury is impaneled and sworn are not binding on the State, and that R.C.M., 1947, §95-1711(3)(d), is constitutional.

24. On October 18, 1975, Appellees applied to the Federal District Court for a Writ of Habeas Corpus on the grounds that the second prosecution was in violation of the Fifth Amendment Double Jeopardy Clause.

25. On December 31, 1975, the United States District Court denied the application for a Writ of Habeas Corpus. *Cline & Bretz v. Montana,* 406 F. Supp. 430 (1975) (Jur.St. p.42).

26. Appellee Cline then appealed to the Ninth Circuit Court of Appeals. The Circuit Court reversed the judgment of the Federal District Court in 546 F.2d 1336 (9th Cir. 1976) (Jur.St. p. 13).

27. The State of Montana then appealed to the United States Supreme Court on December 13, 1976.

28. In the State court appeal, the Montana Supreme Court reversed the conviction of Appellee Cline and affirmed the conviction of Bretz. 555 P.2d 724 (Mont. 1976).

HISTORICAL PERSPECTIVE

The Fifth Amendment Double Jeopardy Clause embodies "one of the oldest ideas found in Western Civilization." *Bartkus v. Illinois,* 359 U.S. 121, 151 (1959) (Black, J., dissenting). The concept of Double Jeopardy dates back to early Greek, Roman and Canon law. *United States v. Jenkins,* 490 F.2d 868, 879-81 (2nd Cir. 1973) (Friendly, J.), affirmed, 420 U.S. 358 (1975).

Blackstone stated that it is a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offense." 4 W. Blackstone, Commentaries 335. Professor Shulhofer points out that the common law plea of former jeopardy was unavailable when proceedings were terminated prior to judgment because jeopardy was not deemed to "attach" until the verdict was rendered and duly recorded. Schulhofer, *Jeopardy and Mistrials,* Univ. of Pa. L. R., Vol. 125, No. 3, p. 453, Jan. 1977. Further, a judge, before recording a verdict, could ask the jury to reconsider its verdict. As long as only one verdict was recorded, a verdict of acquittal could be changed to one of conviction without imposing double jeopardy. *See,* 4 W. Blackstone, Commentaries, 335-38.

American jurisdictions have greatly expanded the scope of the common law doctrine of Double Jeopardy. Fifth Amendment Double Jeopardy has been held to apply to both capital and non-

capital crimes despite the "life or limb" wording of the Amendment. *See, e.g., Green v. United States,* 355 U.S. 184 (1957) (Black, J.). Under the common law, jeopardy did not attach until a verdict was rendered. American courts have expanded the protection of the doctrine by requiring that jeopardy attach upon the swearing of the jury. *Downum v. United States,* 372 U.S. 734 (1963). This rule is rooted in the common law doctrine that, once the jury is sworn, the case is committed to the jurisdiction of the Court and the judge may not dismiss the jury except in cases of "evident necessity." 4 W. Blackstone, Commentaries 360. The common law defendant, however, could not prevail on a plea of former jeopardy after an improper discharge of the jury by the trial judge. *Winsor v. The Queen,* L.R. 1 Q.B. 289 (1866).

The question presented by this appeal is whether or not the rule that jeopardy attaches upon the swearing of the jury is constitutionally mandated?

SUMMARY OF ARGUMENT

When a particular guarantee of the Bill of Rights is incorporated in the Due Process Clause of the Fourteenth Amendment, the same constitutional standards must be applied by both the Federal and State Courts. *Malloy v. Hogan,* 378 U.S. 1, 11 (1964); *Ker v. California,* 374 U.S. 23, 33 (1963); *Pointer v. Texas,* 380 U.S. 400, 406 (1964). The Double Jeopardy Clause of the Fifth Amendment has been applied to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 795 (1969). In interpreting the Double Jeopardy Clause, the U. S. Supreme Court has held that jeopardy attaches upon the impaneling and swearing of the jury. *Downum v. United States,* 372 U.S. 734 (1963); *United States v. Jorn,* 400 U.S. 470 (1970); *Illinois v. Somerville,* 410 U.S. 458 (1973).

Appellee submits that the above authorities require the conclusion that the attachment of jeopardy rule is constitutionally mandated, and thus, no different rule may be adopted by the State Courts.

ARGUMENT

Prior to its decision in *Benton v. Maryland*, 395 U.S. 784 (1969), the Supreme Court employed the "fundamental fairness" doctrine to test the constitutionality of prosecutions by State and Federal authorities under the Double Jeopardy Clause of the Fifth Amendment. *Palko v. Connecticut*, 302 U.S. 319 (1937).

In *Palko*, rather than look to the specific guarantees of the Bill of Rights, the Court ascertained whether "due process" has been satisfied. Under *Palko*, the states were free to differ from the Federal standards governing application of the Fifth Amendment, so long as the totality of the circumstances did not disclose a denial of fundamental fairness. Only when a kind of double jeopardy subjected a defendant to ". . . a hardship so acute and shocking that our polity will not endure it," did the Fourteenth Amendment prohibit reprosecution. *Palko, supra*, at 328.

In *Benton v. Maryland, supra*, the Court rejected the *Palko* "fundamental fairness" doctrine and held that state as well as federal Courts are bound by constitutional standards under the Bill of Rights.

> "*Palko* represented an approach to basic constitutional rights which this Court's recent decisions rejected. It was cut of the same cloth as *Betts vs. Brady*, 316 U.S. 455 (1942), the case which held that a criminal defendant's rights to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." *id.* at 462. . . . Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the states so long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, *Duncan vs.Louisiana, supra*, at 149, the same constitutional standards apply against both the state and federal governments. *Palko's* roots had thus been cut away years ago. We today only recognize the inevitable.." *Benton, supra*, at 794-795.

Thus, in *Benton v. Maryland*, the Court found that the double jeopardy prohibition of the Fifth Amendment represents a

fundamental ideal in our constitutional heritage and applied that guarantee to the states through the Fourteenth Amendment. The validity of defendant Benton's larceny conviction was judged, not by the watered-down standard enunciated in *Palko*, but under the specific provisions and standards of the Fifth Amendment Double Jeopardy Clause.

THE MONTANA COURTS HAVE MISINTERPRETED THE JURY TRIAL DECISIONS

The State of Montana now argues that, although the Montana rule differs from the Federal rule, in substance, it still preserves the constitutional guarantee against double jeopardy. This was the holding of the Montana Supreme Court in its decision that the Federal rule has no inherent merit as opposed to the Montana rule. (App. 26-27). Likewise, the Federal District Court for the District of Montana adhered to this reasoning and relied on the fact that, although the Sixth Amendment Trial by Jury guarantee is imposed upon the states, the states are not required to have twelve-person juries nor are the states required to have unanimous juries; both of which are requirements in the Federal system.

In *Williams v. Florida*, 399 U.S. 78, (1970), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court ascertained what standards or substrata are necessary to impart Constitutional meaning to the Sixth Amendment guarantee to a jury trial. In *Williams*, a majority of the Court found that the twelve-person requirement is not of constitutional stature and, thus, the states are allowed in implementing the Sixth Amendment guarantee to a jury trial, to provide for less than a twelve-person jury.

The *Williams* decision is not authority for the proposition that the states may ignore constitutional standards as to when jeopardy attaches and instead adopt their own standards in that regard.

The requirement of a twelve-person jury in Federal Court is contained in Rule 23(b) of the Federal Rules of Criminal

Procedure. The requirement as to the attaching of jeopardy, on the other hand, is not a federal procedural rule, but rather is a standard pronounced by the Supreme Court in interpreting a fundamental constitutional guarantee. The two requirements are not parallel. One is of constitutional stature and the other is not.

The case *sub judice* is also distinguishable from the *Apodaca* decision. In *Apodaca*, a plurality of the Court rejected the claim that a conviction of a crime by less than a unanimous jury violates the right to trial by jury in criminal cases specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. The Court found that the requirement of unanimity is not of constitutional stature and thus is not obligatory upon the states. Justice White, writing for the plurality, reasoned that the unanimity requirement does not further advance the purpose of the jury trial. That is, the requirement of unanimity does not materially contribute to the interposition between the accused and the accusor of the commonsense judgment of a group of laymen.

The decision in *Apodaca* is anomalous in that: "though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?" *Johnson v. Louisiana*, 406 U.S. 356, 383 (1972) (Douglas, J., dissenting).

Despite the anomalous nature of *Apodaca*, Justice Brennan admonishes:

> "In any event, the affirmance must not obscure that the majority of the Court remains of the view that as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal governments." *Johnson, supra*, at 395. (Brennan, J., dissenting.)

The *Williams* majority and the Apodaca plurality have chosen to treat the twelve-person and unanimity requirements as non-constitutional rules. Neither requirement was found to be an indispensible element of the Sixth Amendment and, thus, neither requirement is obligatory on the states.

The *Williams* and *Apodaca* decisions do not alter the proposition that the Doctrine of Incorporation requires that the Bill of Rights be applied to both federal and state governments by the same "constitutional" standards.

The right to a jury trial and the protection from Double Jeopardy derive from parallel constitutional guarantees. However, the fact that the states are not bound by the twelve-person and unanimity requirements of a federal jury trial, does not mean that the states are at liberty to vary from the rule as to the attaching of jeopardy. The standards underpinning the various constitutional guarantees must be individually analysed to determine whether or not they are of constitutional stature. Unlike the unanimity and twelve-person requirement, the rule that jeopardy attaches upon the swearing of the jury is of constitutional stature and must be applied by the states.

APPLICATION OF THE BILL OF RIGHTS TO THE STATES MUST BE GOVERNED BY CONSTITUTIONAL STANDARDS

In light of *Benton v. Maryland*, the question presently before the Court is whether or not the time at which jeopardy attaches is a constitutional "standard" or, whether, it is non-constitutional consequence of the Supreme Court's supervisory power over Federal Courts which countenances different applications in state and federal courts?

The decisions of this Court clearly indicate that once a constitutional guarantee is found to be a fundamental right incorporated through the Fourteenth Amendment, the same constitutional standards apply against both state and federal governments.

Each time this Court has interpreted the Fourteenth Amendment as encompassing a particular guarantee of the Bill of Rights, the Court has, without exception, ruled that the same constitutional standards apply against both state and federal

authorities. In *Malloy v. Hogan*, 378 U.S. 1, 11 (1963), this Court held:

> "The state urges, however, that the availability of the privilege [self-incrimination] to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. We have held that the guarantees of the First Amendment (cases), the prohibition of unreasonable searches and seizures of the Fourth Amendment, (cases), and the right to counsel guaranteed by the Sixth Amendment, (cases), are all to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the states only a "watered-down, subjective version of the individual guarantees of the Bill of Rights," (cases).' *Malloy v. Hogan, supra*, at 11.

In *Ker v. California*, 374 U.S. 23, 30 (1963), the Court held that the Fourteenth Amendment is enforceable against the states "by the application of the same constitutional standard prohibiting unreasonable searches and seizures." Likewise, in *Pointer v. Texas*, 380 U.S. 400, 406 (1964), the Court held that the Sixth Amendment confrontation clause "is to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment".

Appellee submits that the states have no more liberty to "water-down" the guarantees of the Fifth Amendment than they have to "water-down" the guarantees of the First, Fourth and Sixth Amendments. As with the constitutional guarantees involved in *Malloy, Ker*, and *Pointer*, it would be incongruous to have different standards determine the validity of a claim of Double Jeopardy depending on whether the claim was asserted in a state or a federal court. Since it is the same fundamental constitutional guarantee being asserted in both the federal and

state court, the same standards must determine at what point Fifth Amendment Jeopardy attaches in both federal and state proceedings.

THE POINT IN TIME AT WHICH JEOPARDY ATTACHES IS A STANDARD OF CONSTITUTIONAL DIMENSIONS

Appellants has cited no authority which would suggest that the point in time at which jeopardy attaches is not of constitutional stature. On numerous occasions, this Court has stated that, in a jury trial, jeopardy attaches upon the impaneling and swearing of the jury. *Downum v. United States*, 372 U.S. 734 (1963); *United States v. Jorn*, 400 U.S. 470 (1970); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Martin Linen Supply Co.*, 51 L.Ed.2d, #4, p. 642 (1977). The rule concerning the attaching of jeopardy is not a mere "technicality", arbitrarily chosen by the Court. On the contrary, the Court has expressed sound policy reasons for having jeopardy attach when a jury is impaneled and sworn.

> "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy". See *United States v. Jorn, supra*, at 480. *In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. Downum v. United States*, 372 U.S. 734 (1963); *Illinois v. Somerville*, 410 U.S. 458 (1973). In a nonjury trial, jeopardy attaches when the court begins to hear evidence. *McCarthy v. Zerbst*, 85 F.2d 640, 642 (CA10 1936). See *Wade v. Hunter*, 336 U.S. 684, 688 (1949). The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States v. Jorn, supra*, at 479. [Further citations omitted.]" *Serfass v. United States*, 420 U.S. 377, 388 (1974).

The policies alluded to in the *Serfass* decision are expressed in *Green v. U.S.*, 355 U.S. 184 (1957).

> "The constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."
>
> * * *
>
> "The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The policy behind having jeopardy attach when the jury is impaneled and sworn, is expressed as follows:

> "Moreover it is not even essential that the verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once if put on trial before a jury so that if the jury is discharged without his consent he cannot be tried again. [citations omitted]. This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that a jury might not convict." *Green, supra*, at 188.

The Court later elaborated on these policies in *U.S. v. Jorn*, 400 U.S. 470 (1970), wherein it held:

> "The Fifth Amendment's prohibition against placing a defendant twice in jeopardy represents a constitutional policy of finality for the defendant's benefit in Federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for

> an individual defendant is manifest in the willingness to limit the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both of these considerations are expressed in *Green v. U.S.* . . . [quotation from *Green* omitted]. These considerations have lead this court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge. [citations omitted].
>
> * * *
>
> "*Thus the conclusion that "jeopardy attaches" when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in a proceeding.*" *Jorn, supra*, at 479-480.

The significance the Court places on the swearing of the jury is consistent with the American scheme of justice. The jury is "the most transcendant privilege which any subject can enjoy and is justly dear to the American people." *Dimick v. Schiedt*, 293 U.S. 474, 485 (1934). It is the jury which is the finder of fact and which must ultimately determine guilt or innocence. Once a jury of peers has been impaneled and sworn to sit in judgment of a fellow citizen, the constitutional policies underpinning the double jeopardy clause are brought into play. To allow a state to dismiss the entire prosecution after the swearing of the jury is to thwart the very policies the Court has chosen to protect by having jeopardy attach at that point in time.

THE MONTANA RULE UNDERMINES CONSTITUTIONAL POLICIES AND WORKS TO THE PREJUDICE OF THE DEFENDANT

The rule that jeopardy attaches when a jury is impaneled and sworn is much less subject to prosecutorial manipulation than is the Montana rule. The time between the impaneling of the jury and the swearing of the jury is negligible whereas the time between the swearing of the jury and the swearing of the first witness is, most often, considerable. Juries are invariably sworn by the Court immediately upon being impaneled. If a prosecutor were to make a motion to dismiss the prosecution after the jury was impaneled but before it was sworn, the court would most certainly suspect prosecutorial manipulation. Normally, there is nothing that transpires after the jury has been impaneled but before it is sworn which would warrant dismissal of the entire prosecution.

The period of time between the swearing of the jury and the swearing of the first witness is an entirely different matter. Although the swearing of the first witness generally follows shortly after the swearing of the jury, there still remains a very crucial interim period during which counsel may make opening statements and either side may make motions. This period of time may take only a few hours or it may span a week-end recess, thus taking days. Regardless of the length of time involved, the fact remains, in Montana, that this is a period of time when the state may contemplate the desirability of the jury panel which has been sworn as well as hear the opening statement of the defense counsel should he choose to make one. If a prosecutor does not like what he hears in the opening statements or if he decides that the jury is defense oriented, he can dismiss the entire prosecution without justification, thus denying the defendant his valued right to have his trial completed by a particular tribunal. *United States v. Jorn*, 400 U.S. at 484. The Montana statute not only defeats the policies underpinning the Double Jeopardy Clause, but also lends itself to covert manipulation.

The Supreme Court has emphatically discouraged pre-verdict dismissals of juries.

> "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori v. U.S.*, 367 U.S. 364 (1961).
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> "The discretion to discharge the jury before it has reached a verdict is to be exercised only in the very extraordinary and striking circumstances, to use the words of Mr. Justice Story in *U.S. v. Coolidge*. . . For the prohibition of the Double Jeopardy Clause is not against being twice punished but against being twice put in jeopardy." *Downum v. U.S.*, 372 U.S. 734, at 736.

Contrary to the pronouncements of the Supreme Court that discharge of a jury prior to verdict is to be exercised only in "very extraordinary and striking circumstances", *Downum, supra*, the Montana procedure allows the prosecution to dismiss a jury prior to verdict without any showing of "extraordinary circumstances" or "manifest necessity." In essence, the Montana procedure gives the prosecution an infinite number of peremptory challenges by allowing the prosecution to dismiss, arbitrarily, an entire prosecution; discharge the jury; refile an Information and pick a new jury of twelve men and women. This alone offends all concepts of fair play and due process and subjects the defendant to considerable prejudice. Most importantly, the defendant is "deprived of his valued right to have his trial completed by a particular tribunal." *U.S. v. Jorn*, 400 U.S. at 484. The Supreme Court does not look lightly upon the circumventing of this "valued right." See *Wade v. Hunter*, 336 U.S. 684, 689 (1948). Additionally, such a premature dismissal denies the defendant his right to proceed to verdict on the viable counts of the Information. Finally, the defendant is further prejudiced by the fact that he has no corresponding privilege of aborting the entire proceeding at his whim and picking a new jury more to his liking. The Montana defendant is denied the privilege afforded the prosecutor of examining the jury as a whole and the option of

challenging all twelve jurors and starting anew. The Montana Rule not only deprives defendant of his right to have his trial completed by a particular tribunal, but also, it fails to put the defendant on an equal footing with the prosecution in terms of challenging jurors.

The pronouncements by the Court in *Jorn* and *Green*, clearly indicate that the time at which jeopardy attaches is not a mere "technicality," *Serfass v. United States*, 420 U.S. 377, 391 (1974), but rather is a statement of policy designed to protect both state and federal defendants from repeated prosecutions and to prevent the prosecution from enhancing its opportunities to convict. It establishes a point in time beyond which a jury may not be dismissed without a showing of manifest necessity or extraordinary circumstances. The Montana rule, on the other hand, defeats these very policies by allowing the prosecution a considerable period of time to dismiss the jury prior to verdict without any showing of manifest necessity. Conceivably, this process could continue *ad infinitum* until the prosecution obtained a jury to its liking. Appellee submits that this is entirely contrary to the "incorporation" of the Fifth Amendment under *Benton v. Maryland, supra*, and does not even satisfy the "watered-down" fundamental fairness standard of *Palko* which has been rejected by this Court.

THE FEDERAL COURTS, WITHOUT EXCEPTION, HAVE IMPOSED THE SERFASS STANDARD UPON THE VARIOUS STATES

The point at which jeopardy attaches is a standard enunciated by the Supreme Court most recently in *United States v. Martin Linen Supply Company, supra*, and is not a rule of Federal Criminal Procedure. This standard must be applied as an element of the Fifth Amendment, "lock, stock and barrel" to the states. *Benton v. Maryland, supra*, at 801 (Harlan, J., dissenting, and characterizing the majority's approach to "incorporation").

Nothing could be more crucial to the "application" of double jeopardy than the determination at what point jeopardy attaches. This is precisely why the Federal courts, when reviewing state court proceedings, have not only determined what constitutes a "trial" for purposes of the Fifth Amendment, but also have told the states at what point jeopardy attaches.

For example, in *Breed v. Jones*, 421 U.S. 519 (1975), the Court held that the prosecution of Breed as an adult in California Superior Court, after an adjudicatory finding in juvenile court that he had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated the Double Jeopardy Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment. In interpreting the *Breed* case, the Federal District Court for the District of Montana held:

> "Nowhere in the opinion [*Breed*] does the Court baldly assert that a state cannot determine at what point trial commences. Nor does the Court ever attempt to impose any federal procedural rule upon the California Juvenile Court. The sole concern in *Breed*, as it is in the instant case, is not whether federal procedures were followed, but whether federally guaranteed rights were violated." *Cline v. Montana*, 406 F. Supp. 430 (1975) (Jur. St. p. 42).

Appellee Cline agrees that the Supreme Court did not baldly assert that a state cannot determine at what point a trial

commences. Appellee does submit, however, that the Court went further than deciding that a juvenile proceeding constituted a "trial" within the meaning of the Fifth Amendment Double Jeopardy Clause. The Court specifically ruled as to what point in time jeopardy attached. Chief Justice Burger, speaking for a unanimous Court, stated:

> "We therefore conclude that the respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when the respondent was "put to trial before the trier of facts," *ibid.*, that is, when the juvenile court, as the trier of the facts, began to hear evidence. See *Serfass v. United States*, 420 U.S. 388." *Breed v. Jones*, 421 U.S. 519, 531 (1974).

Although the Court did not "baldly assert" that California could not determine at what point a trial commenced, it did impose the federal standard as to when jeopardy attaches upon the California State Juvenile Court.

Although the *Breed* case involved a judge trial rather than a jury trial, the case is significant because the Court imposed the federal standard on the California Court and cited *Serfass v. United States* as authority. The *Serfass* decision states that in the case of a nonjury trial, jeopardy attaches when the court begins to hear evidence, however, "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Serfass, supra*, at 388.

Appellee Cline submits that had the *Breed* case been a jury trial, the Supreme Court likewise would have cited *Serfass* and held that jeopardy attached when a jury was impaneled and sworn. The conclusion of the District Court that the states may determine for themselves when jeopardy attaches is incorrect as is evidenced by the Supreme Court's specifically applying the federal standard to the State of California. In *Breed*, the Supreme Court effectively held that the standard enunciated in *Serfass* is of constitutional stature and that the states may not determine for themselves at what time jeopardy attaches.

Seven Circuit Courts of Appeals (including the 9th Circuit) have addressed themselves to habeas corpus petitions from state

prisoners and all seven Circuits have held that the decisions of the United States Supreme Court require that jeopardy attach when the jury is impaneled and sworn. Four of the Circuits have applied the federal rule to the states as a matter of course with no discussion of the issue. *United States ex rel. Rogers v. LaVallee*, 517 F.2d 1330, 1333 (2nd Cir. 1975); *cert. den.*, 423 U.S. 1078 (1976); *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034, 1039 (3rd Cir. 1975); *Whitfield v. Warden of Maryland*, 480 F.2d 1118, 1122 (4th Cir. 1973); *Thomas v. Beasley*, 491 F.2d 507, 508 (6th Cir. 1974).

In *United States ex rel. Somerville v. Illinois*, 447 F.2d 733, 735 (7th Cir. 1971), rev'd. on other grounds, 410 U.S. 458 (1973), the Seventh Circuit was presented with an argument identical to the argument made here, and ruled that federal, not state, law "is controlling on the issues as to when jeopardy attaches." In *Smith v. Mississippi*, 478 F.2d 88, 93 (5th Cir.) *cert. den.*, 414 U.S. 1113 (1973), the Fifth Circuit addressed a double jeopardy claim of a state prisoner and concluded:

> "The [state's] contention that petitioner was not put to trail or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in *Downum* . . . and *Somerville* . . . . In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn. The mere introduction of evidence has no spontaneous affect on the defendant which can be said to automatically charge him with an appreciable degree of insecurity once he has made the preparations for trial and selected those of his peers who will determine his fate."

Implicit in the Fifth Circuit's reliance on *Downum* and *Somerville* is the reasoning that sound policy dictates having jeopardy attach upon the swearing of the jury. The Montana Supreme Court ignored these policy considerations when it held that jeopardy does not attach until the swearing of the first witness. (App. p. 27). The Montana Court based its decision on the premise that the jury has nothing to consider prior to the swearing of the first witness. This premise is inaccurate. First of all, as pointed out earlier, the jury does have the opening

statements of counsel to consider prior to the swearing of the first witness. Secondly, the jury has nothing other than the opening statements to consider after the swearing of the witness because the witness has not yet begun to testify. Even assuming, *arguendo*, that jeopardy attaches at a point later in time [after the testimony commences], the *Smith* decision points out, "The mere introduction of evidence has no spontaneous affect on the defendant which can be said to automatically charge him with an appreciable degree of insecurity once he has made the preparations for trial and selected those of his peers who will determine his fate." *Smith, supra* at 93.

Not only does the Montana rule work to the distinct prejudice of the criminal defendant, but also, it has no supporting basis in policy or logic. It opens the door to dismissals after the jury is sworn thus depriving the defendant of his valued right to have his trial completed by a particular tribunal. *United States v. Jorn*, 400 U.S. at 484-485. It undermines the defendant's right to be free from financial, physical and psychological intervention worked by repetitive prosecutions. *Green v. United States*, 355 U.S. 184, 187-88 (1957). Also, as pointed out previously, the Montana rule in effect allows the prosecution an infinite number of peremptory challenges to the jury.

CONCLUSION

Appellee Cline submits that the decisions of this Court in *Downum v. United States*, 372 U.S. at 735-36, (that jeopardy attaches when a jury is impaneled and sworn), and *Benton v. Maryland*, 395 U.S. at 795 ("the same constitutional [double jeopardy] standards apply against both the state and federal governments"), and *Breed v. Jones*, 421 U.S. 519 (applying the attachment of jeopardy rule to the State of California), mandate that the Ninth Circuit Court of Appeals be affirmed in its ruling that the attachment of jeopardy rule is of constitutional stature and thus must be followed by the state courts.

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